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In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD H. GENS
AND
HELEN D. GENS,
PETITIONERS,

v.

THE UNITED STATES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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I

QUESTIONS PRESENTED

1. Whether an involuntary petition in bankruptcy puts the property of the alleged debtor in *custodia legis* without notice and hearing or other due process of law?

2. Whether a spouse whose income contributes to a tax determination is entitled to share in any overpayment of tax thereon?

TABLE OF CONTENTS

	Page
Questions Presented	1
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes and Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
Conclusion	9
Appendix "A"—Opinion and Order Dated 2/20/80	10
Appendix "B"—Opinion and Order Dated 2/24/82	24
Appendix "C"—Text of Relevant Constitutional Provisions, Statutes and Regulations	29

TABLE OF CITATIONS

Cases

Acme Harvester Co. v. *Beekman Lumber Co.*, 222 U.S. 1085 (1911) 8

Glaubke v. *United States*, 41 AFTR 2d 78-759 (E.D.Va. 1978) 6

McAuley v. *United States*, 525 F.2d 1108 (9th Cir. 1975) 8

United States v. *Verlinsky*, 459 F.2d 1085 (5th Cir. 1972) 8

Constitution

United States Constitution, Amendment V 2, 7, 8

Amendment XIV 2, 7

Statutes

Repealed Title 11, 11 U.S.C. §109 2

11 U.S.C. §110 2

26 U.S.C. §6502 ..... 2, 6, 8

§6503(b) 2, 5

§6672 ..... 2, 3, 4, 5

28 U.S.C. §1255 2

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Petitioner Richard H. Gens and Helen D. Gens respectfully pray that a Writ of Certiorari be issued to the United States Court of Claims to review the final judgment of the United States Court of Claims dismissing petitioners' petitions and awarding judgment to respondent on its counterclaim.

Opinions Below

The Court of Claims entered two opinions in the cases reported at 222 Ct.Cl. 407, 615 F.2d 1335 (1980) and Ct.Cl. Case No. 82-734, 673 F.2d 366 (1982).

Copies of said opinions are annexed hereto as Appendices "A" and "B".

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1255.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions, statutes and regulations which are relevant to this case, the pertinent texts of which are set forth in Appendix "C" hereto, are:

1. United States Constitution, Amendment V and Amendment XIV
2. 26 U.S.C. §§6502, 6503(b), 6672
3. Repealed Title 11, 11 U.S.C. §§109, 110

Statement of the Case

Plaintiffs sued in the Court of Claims for income taxes overpaid for the years 1968, 1970, and 1971,[1] which overpayments the Commissioner of Internal Revenue applied to satisfy certain 100-percent penalty assessments made against plaintiff Richard Gens pursuant to section 6672 of the Internal Revenue

[1] Plaintiffs claimed a refund of overpaid 1968 taxes of $42,750.83, as a result of the carryback of a net operating loss for 1971. This amount, plus interest of $342.17, was credited by the Service to plaintiffs' joint account.

Of the total of $43,093.00 credited to plaintiffs' joint account, $7,185.67 was applied to plaintiffs' joint income tax liability outstanding for 1972; and $32,628.13 of the 1968 overpayment was applied by the Service to penalties for 1970 outstanding against Richard alone.

Excessive withholding from wages resulted in overpayment of income tax with respect to plaintiffs' 1970 and 1971 joint returns. For the tax year of 1970, this overpayment was $39,999.48; for the tax year 1971, this overpayment was $3,687.34.

Plaintiffs claimed a refund of overpaid 1970 income taxes of $39,802.09, and a refund of overpaid 1971 income taxes of $2,154.92. These claims were disallowed in full by the Service because the overpayments had been applied to offset 100-percent penalties assessed against Richard alone.

The penalty assessments and interest thereon, to which overpayments of tax by the two plaintiffs were applied, were made solely against plaintiff Richard H. Gens.

Code of 1954, and for refund of token payments made by Richard Gens with respect to certain other 100-percent penalty assessments. The Government filed a counterclaim for the unpaid portion of the penalty assessments made with respect to the penalty assessments.

The three returns show income from wages, dividends, interest, rentals and gains from sales of securities. For two of the years, W-2 forms attached to the returns show the wages to have been Richard's. No W-2 form is attached for the third year. The schedules for interest and capital gains show that Helen's investments and her share of jointly owned investments generated $76 of the 1968 income and $2,187 of the 1970 income, a total of $2,263.

The source of the overpayments was sums withheld from wages and a cash payment of taxes in 1968. The returns of course do not show the source of the cash payment, whether Helen's or Richard's funds. No cancelled check was produced and Helen, who was present at trial, did not testify.[1]

For one or more quarters in 1970, 21 corporations which operated nursing homes failed to pay over to the Federal Government income withholding and FICA taxes (hereinafter referred to as payroll taxes). On March 19, 1971, the Internal Revenue Service (IRS) assessed against plaintiff Richard Gens 100-percent penalties equaling the unpaid 1970 payroll tax liabilities of 14 corporations. (Hereinafter these 14 corporations will be referred to as the Massachusetts group). The 100-percent penalty assessments were made pursuant to section 6672 of the Internal Revenue Code. On March 29, 1971, the Massachusetts group of corporations instituted Chapter XI bankruptcy proceedings in the United States District Court for

[1] Richard Gens, who did testify, could not say of the cash payment in 1968 "where, how and between whom" it was made. Of Helen's employment, he said only that he and she were employees of companies mentioned in the returns "for a period of time, commencing in the early sixties and ending in the late sixties." Mr. Hyman Silver, a former associate, testified by deposition that Helen was not employed in the years in question.

the District of Massachusetts and were later adjudged bankrupts. On October 18, 1971 a creditors' petition requesting that plaintiff Richard Gens be adjudged a bankrupt was filed in the United States District Court for the District of Massachusetts. On April 3, 1972, the creditors' petition was dismissed, the bankruptcy court adjudging that Richard Gens was not a bankrupt. No actual custody of the property of Richard Gens was taken in these proceedings.

On January 15, 1973, the IRS assessed against plaintiff Richard Gens section 6672 penalties in the amount of the unpaid 1970 payroll tax liabilities of the other seven nursing home corporations. (Hereinafter these seven corporations will for convenience be referred to as Connecticut group although not all operated in Connecticut.) In 1973, Richard Gens made token payments to the IRS with respect to the Connecticut group penalty assessments and then filed with the IRS timely claims for refund of the payments. The IRS denied the claims. Also in 1973 plaintiff Richard Gens and his spouse, Helen Gens, filed timely claims with the IRS for refund of income tax overpayments made with respect to taxable years 1968, 1970 and 1971. With respect to those years, plaintiffs had filed joint income tax returns. The IRS denied the claims for refund, indicating that the overpayments had been credited against the penalty assessments made against Richard Gens with respect to the Massachusetts group of corporations.

In 1974, plaintiff Richard Gens filed a timely petition in The Court of Claims for refund of the aforementioned token payments made with respect to the Connecticut group. Concurrently with the filing of that petition, plaintiffs Richard Gens and Helen Gens filed a separate timely petition for refund of the aforementioned income tax overpayments.

On January 12, 1977, the United States District Court for the District of Massachusetts ordered the trustees in bankruptcy for the Massachusetts group of corporations to pay the sum of $382,294.52 to the Government to satisfy the payroll

tax liabilities outstanding in the names of the corporations of the Massachusetts group. The Government received payment of the aforementioned sum on January 17, 1977. As a result of this collection of the taxes for which the corporations were liable, the IRS abated, on July 6, 1977, the 100-percent penalty assessments which had been outstanding in the name of plaintiff Richard Gens with respect to the 14 corporations of the Massachusetts-group. On June 23, 1977 and July 7, 1977, the IRS transferred the income tax overpayments which had been credited against the Massachusetts-group penalty assessments to credit against the penalty assessments made against Richard Gens with respect to the Connecticut group.

On November 2, 1977, the IRS assessed against Richard Gens interest on the Massachusetts group penalty assessments, said interest being computed from March 19, 1971 to January 17, 1977 the date it received, from the trustees in bankruptcy, payment of the underlying taxes. On November 30, 1977, the Government filed a counterclaim in this case for the interest assessments and for the unpaid amount of the Connecticut group penalty assessments. In its brief in the Court of Claims the Government revised its computation of the interest assessments so that it now seeks interest on the Massachusetts group penalty assessments from March 29, 1971, to January 17, 1977.

Plaintiff Richard Gens has admitted that, for 1970, he was a responsible person liable under section 6672 with respect to 20 of the nursing home corporations. With regard to the remaining corporation, the Government has agreed that he was not a responsible person under section 6672.

The Court of Claims concluded that the filing of an involuntary petition does not establish automatically in the bankruptcy court, for purposes of section 6503(b), control over or custody of all or substantially all of the assets of the alleged bankrupt. They further concluded that where the petition is dismissed through an adjudication that the alleged bankrupt

is not a bankrupt, the control or custody of his assets continues to repose in the bankruptcy court to the time of the adjudication. The Court of Claims then ruled that the running of the section 6502 period of limitations on collection of the Massachusetts-group penalty assessments made against plaintiff Richard Gens was suspended from the time of the filing of the bankruptcy petition against plaintiff to the time of his being adjudicated not a bankrupt and for 6 months thereafter. Because section 6502 was tolled for that period, the November 2, 1977 assessments of interest against plaintiff Richard Gens and the filing of defendant's counterclaim for the assessed interest were not timebarred.

The Court then ruled that it is well settled that "[s]pouses filing a joint return have separate interests in any overpayment, the interest of each depending on his or her income, i.e., an overpayment is apportionable to a spouse to the extent that he or she contributed to the overpaid tax." The case was remanded to the Trial Division to determine the interest of each spouse in the overpayment.

The trial judge found and the Court adopted the view that *Glaubke* v. *United States*, 41 AFTR 2d 78-759 (E.D.Va. 1978) controlled where, as in the present case, the Commissioner was seeking an overpayment on a joint tax return to a separate tax liability of the husband. Both spouses had income and the source of the overpayment was withholding on wages of both. The Commissioner sought to apply the sums withheld on the wife's wages to the joint tax liability, so that the sums withheld on the husband's wages would become the overpayment available to satisfy his separate liability. The court held, rather, that only the husband's proportionate share of excess withholding could be applied to the tax liability. The wife was entitled to a share of the overpayment equal to the ratio of her contributed withholding to total withholding.

Contribution to income was tacitly rejected. Some of the wife's income had not been subjected to withholding. The

ratio of her income to total income was thus different from the ratio of her withholding to total withholding. Yet it was the Court's decision that the overpayment was to be divided in proportion to the relative contributions of excess withholding constituting the overpayment, not the contributor to income.

The Court ruled that Mrs. Gens is therefore not entitled to any part of the overpayment, for failure of proof that she paid any part of it. The entire overpayment was properly applied to the separate tax liability of Mr. Gens. The amount of the counterclaim for the balance of his tax liability was ruled fully payable.

Reasons for Granting the Writ

The issues raised by this case concern questions arising under federal bankruptcy laws, involving the fundamental right of taxpayers to be protected against deprivation of property without due process of law, as guaranteed by the Fifth and Fourteenth Amendments. Because resolution of these issues affect the very framework of our national system of tax collection, and because there has been no decision rendered by this Court or any Tax Court as to whether an involuntary bankruptcy petition, filed but subsequently dismissed, tolls the statute of limitations for tax collections, the Petitioners submit that the issues presented are of sufficient importance to warrant that this Court exercise its discretion to hear argument of counsel.

The government contends that the mere filing of an involuntary bankruptcy petition by a creditor, which is subsequently dismissed against the alleged bankrupt, tolls the statute of limitations for tax collections. Case law, however, dictates that such is not automatically the case. Whether or not a bankruptcy proceeding tolls the statute of limitations for tax collection depends on the circumstances of each case.

In the instant case, the United States District Court for the District of Massachusetts dismissed the bankruptcy proceeding

against the Petitioner, Richard H. Gens. A trustee in bankruptcy was never appointed, no creditors' meeting was held, and the Court never exercised any authority or control over the assets of the Petitioner to warrant a stay of the collection process. A bankruptcy action must be prosecuted and control over the debtor's assets asserted for the collection efforts of individual creditors to be legally suspended. *United States* v. *Verlinsky*, 459 F.2d 1085 (5th Cir. 1972). Therefore, since the assets of the Petitioner/Taxpayer were not frozen by the filing of the involuntary bankruptcy proceeding, the government was free to bring suit against the Petitioner/Taxpayer at any time during the six-year period provided pursuant to I.R.C. §6502(a).

The decisions in *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U.S. 300 (1911), *McAuley* v. *United States*, 525 F.2d 1108 (9th Cir. 1975), and *Verlinsky*, *supra*, require that the statute of limitations not be tolled in the present case, for it is the bankruptcy court's assertion of jurisdiction over the taxpayer's assets which determines when the statute of limitations is tolled. Since such an assertion of jurisdiction was never made in the instant case, the statute of limitations was never tolled, and the decision of the Court of Claims is in conflict with the principles of bankruptcy law.

Conclusion

The Court of claims erroneously ruled that a person's property becomes *custodia legis* and distrained without notice and hearing by operation of an involuntary petition under the Bankruptcy Act.

It further erred in ruling that a husband and wife in a joint tax return cannot recover a share in tax overpayments based on their contribution to income or their rights in the asset.

Both rulings violate the due process clause of the Fifth Amendment by depriving plaintiffs of their property without such due process.

Wherefore petitioners pray that a Writ of Certiorari to the Court of Claims be granted.

Respectfully submitted,
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and HELEN D. GENS,

By their attorney,

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